No. 90-944.

In the

Supreme Court of the United States.

OCTOBER TERM, 1990.

ROLAND M. AND MIRIAM M.,
PETITIONERS,

v.

THE CONCORD SCHOOL COMMITTEE, ET AL.,
RESPONDENTS.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

Brief for the Respondent in Opposition.

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Statement of the Case.

Matthew M. is a fourteen year old student identified as having special needs pursuant to the Education of the Handicapped Act, 20 U.S.C. §§ 1401 *et seq.* (EHA), and Massachusetts General Laws c. 71B. As Matthew is a resident of the town of Concord, the Concord School Committee is responsible for the provision of special education and related services for Matthew.

In August of 1986, the Respondent Concord School Committee (Concord) developed an Individualized Education Plan (IEP) for Matthew M. for the 1986-1987 school year designating a 502.4 substantially separate placement within the public school setting. On September 9, 1986, the Petitioners, Roland M. and Miriam M. (Parents), rejected the proposed IEP and unilaterally placed Matthew in a 502.6 residential program at the Landmark School, a private education facility. On February 9 and 10, March 12, 13, 19 and 23, 1987, the Bureau of Special Education Appeals (B.S.E.A.) of the Respondent Department of Education (DOE) conducted an administrative hearing regarding the appropriateness of the IEP developed by Concord for the 1986-1987 school year.

In May of 1987, in compliance with the procedural requirements of the EHA and M.G.L. c. 71B, Concord developed an IEP specifying a 502.4 placement within the public school setting for Matthew's 1987-1988 school year.

On or about June 11, 1987, the B.S.E.A. issued a written decision wherein it determined that the 1986-1987 Concord 502.4 IEP, with minor modification, was superior to the Landmark 502.6 program in "credentials and experience of staff, methodology, extent and type of services, and opportunity for mainstreaming." *Matthew M.*, Pet. A. at 5a-6a.[1] Moreover, the hearing officer specifically noted that "Matthew's needs are not so severe as to dictate a residential placement and even if they were or become so in the future, . . . Landmark is not an appropriate service provider." *Matthew M.*, *id.* at 7a.

The Parents subsequently filed a complaint in the U.S. District Court pursuant to 20 U.S.C. § 1415, 29 U.S.C. § 794(b) (§ 505(b)) of the Rehabilitation Act of 1973, and 42 U.S.C. § 1983 and § 1988, in which they requested judicial review of

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[1] References to "Pet. A. " are to the Appendix to the Petition for Writ of Certiorari.

that B.S.E.A. determination. *Roland M. et al.* v. *Concord School Committee et al.*, Civil Action No. 87-2107-Z.

On July 10, 1987, the Parents rejected the Concord IEP for the 1987-1988 school year. In compliance with the B.S.E.A. decision concerning the previous school year (which decision was rendered subsequent to the Parents' rejection of Concord's proposed IEP for the 1987-1988 school year), Concord amended its proposed 1987-1988 IEP, which IEP, as amended, was rejected by the Parents in August of 1987. At the commencement of the 1987-1988 school year, despite the B.S.E.A.'s decision concerning the inappropriateness of the Landmark placement for the 1986-1987 school year, the Parents re-enrolled their child in the residential program at the Landmark School.

On or about February 24, March 8, 10, 28, April 6, 29 and May 25, 1988, the B.S.E.A. conducted an administrative hearing regarding the appropriateness of the IEP as amended proposed by Concord for the 1987-1988 school year.

On or about August 24, 1988, the B.S.E.A. issued a written decision wherein it determined that "considering the totality of Matthew's special educational/emotional/social needs, and the calibre, expertise, and competence of his proposed direct service providers at Concord responsible for addressing these special needs, . . . Concord's 1987-1988 program far exceeds his educational program at Landmark School," and that Concord's proposed IEP constituted an appropriate program for Matthew for the 1987-1988 school year. *Matthew M.*, Pet. A. at 51a.

The Parents subsequently amended the Complaint filed in connection with the B.S.E.A. determination with respect to the 1986-1987 school year to include a request for judicial review of the B.S.E.A. determination with respect to the 1987-1988 school year.

On or about January 19, 1989, Concord submitted a motion in limine in opposition to admission of additional evidence, based upon the Parents' deliberate withholding of the additional

evidence during the course of the administrative adjudicatory proceeding regarding the 1987-1988 school year.

On or about March 10, 1989, the District Court, in an exercise of judicial discretion by Judge Rya Zobel, allowed Concord's motion and precluded the Parents from submitting additional evidence to the court during its review of the administrative adjudicatory proceedings concerning both the 1986-1987 and 1987-1988 school years.

On or about October 27, 1989, following receipt of written and oral argument submitted by the parties, the District Court issued a written decision wherein it determined that "the B.S.E.A. decision finding both IEPs appropriate is affirmed and that portion of the decision granting reimbursement is reversed," and thereupon entered judgment on behalf of the Concord School Committee. *Roland M. et al.* v. *The Concord School Committee et al.*, Civil Action No. 87-2107-Z, slip op. at 19 (Mass. D.C. Oct. 27, 1989).

On or about December 2, 1989, following the District Court's denial of the Parents' Motion Under Rule 59 for Rehearing and Amendment of Findings, the Parents appealed to the First Circuit Court of Appeals.

On or about August 3, 1990, following receipt of written and oral argument submitted by the parties, the First Circuit Court of Appeals issued a written decision wherein it determined that 1) "the district court did not err in determining that Concord's IEPS were prepared with sufficient procedural safeguards and provided an adequate and appropriate educational plan for Matthew; 2) . . . the district court did not misuse its discretion in barring the proffered testimony of witnesses deliberately withheld at the administrative level or refusing to upset the second B.S.E.A. decision on the ground of bias; and 3) . . . appellants were not entitled to be reimbursed for any part of the costs stemming from their son's unilateral enrollment in a private residential school since Concord had offered — and

the parents had spurned — an adequate, appropriate public education," and thereupon affirmed the District Court decision. *Roland M.* v. *Concord School Committee*, 910 F.2d 983, 1000 (1st Cir. 1990) Pet. A. at 99a.

Statutory Provisions Involved.

20 U.S.C. § 1415(e)(2)

(2) Any party aggrieved by the findings and decision made under subsection (b) of this section who does not have the right to an appeal under subsection (c) of this section, and any party aggrieved by the findings and decision under subsection (c) of this section, shall have the right to bring a civil action with respect to the complaint represented pursuant to this section, which action may be brought in any State court of competent jurisdiction or in a district court of the United States without regard to the amount in controversy. In any action brought under this paragraph the court shall receive the records of the administrative proceedings, shall hear additional evidence at the request of a party, and, basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate.

Federal Rules of Civil Procedure

Rule 16(c)-(e) — Pre-Trial Conferences; Sched.; Mgmt.

(c) SUBJECTS TO BE DISCUSSED AT PRE-TRIAL CONFERENCES. The participants at any conference under this rule may consider and take action with respect to

1. the formulation and simplication of the issues, including the elimination of frivolous claims or defenses;

2. the necessity or desirability of amendments to the pleadings;

3. the possibility of obtaining admissions of fact and of documents which will avoid unnecessary proof, stipulations regarding the authenticity of documents, and advance rulings from the court on the admissibility of evidence;

4. the avoidance of unnecessary proof and of cumulative evidence;

5. the identification of witnesses and documents, the need and schedule for filing and exchanging pretrial briefs, and the date or dates for further conferences and for trial;

6. the advisability of referring matters to a magistrate or master;

7. the possibility of settlement or the use of extrajudicial procedures to resolve the dispute;

8. the form and substance of the pretrial order;

9. the disposition of pending motions;

10. the need for adopting special procedures for managing potentially difficult or protracted actions that may involve complex issues, multiple parties, difficult legal questions, or unusual proof problems; and

11. such other matters as may aid in the disposition of the action.

At least one of the attorneys for each party participating in any conference before trial shall have authority to enter into stipulations and to make admissions regarding all matters that the participants may reasonably anticipate may be discussed.

. . .

(e) PRETRIAL ORDERS. After any conference held pursuant to this rule, an order shall be entered reciting the action taken. This order shall control the subsequent course of the action unless modified by a subsequent order. The order following a final pretrial conference shall be modified only to prevent manifest injustice.

Rule 52(a)

(a) EFFECT. In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. It will be sufficient if the findings of fact and conclusions of law are stated orally and recorded in open court following the close of the evidence or appear in an opinion or memorandum of decision filed by the court. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41(b).

Federal Rules of Appellate Procedure

Rule 35(a)

(a) WHEN HEARING OR REHEARING IN BANC WILL BE ORDERED. A majority of the circuit judges who are in

regular active service may order that an appeal or other proceeding be heard or reheard by the court of appeals in banc. Such a hearing or rehearing is not favored and ordinarily will not be ordered except (1) when consideration by the full court is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance.

Rules of the Supreme Court of the United States

Rule 10.1(a)-(c)

10.1. A review on writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only when there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered:

> (a) When a United States court of appeals has rendered a decision in conflict with the decision of another United States court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.
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> (c) When a state court or a United States court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way that conflicts with applicable decisions of this Court.

Massachusetts General Laws

30A:14 Judicial review.

Section 14. Except so far as any provision of law expressly precludes judicial review, any person or appointing authority aggrieved by a final decision of any agency in an adjudicatory proceeding, whether such decision is affirmative or negative in form, shall be entitled to a judicial review thereof, as follows: —

Where a statutory form of judicial review or appeal is provided such statutory form shall govern in all respects, except as to standards for review. The standards for review shall be those set forth in paragraph (7) of this section, except so far as statutes provide for review by trial de novo. Insofar as the statutory form of judicial review or appeal is silent as to procedures provided in this section, the provisions of this section shall govern such procedures.

Where no statutory form of judicial review or appeal is provided, judicial review shall be obtained by means of a civil action; as follows:

(1) Proceedings for judicial review of an agency decision shall be instituted in the superior court for the county (a) where the plaintiffs or any of them reside or have their principal place of business within the commonwealth, or (b) where the agency has its principal office, or (c) of Suffolk. The court may grant a change of venue upon good cause shown. The action shall, except as provided in section thirty-two of chapter six, be commenced in the court within thirty days after receipt of notice of the final decision of the agency or if a petition for rehearing has been timely filed with the agency, within thirty days after receipt of notice of agency denial of such petition for rehearing. Upon application made within the thirty-day period or any extension thereof, the court may for good cause shown extend the time.

Summary of the Argument.

I. The First Circuit Court of Appeals correctly applied a "clearly erroneous" standard of review following its determination that the District Court had employed the correct governing legal principle (pp. 10-12).

II. Petitioner can demonstrate no jurisdictional basis for the Court to consider any argument relative to an alleged time-bar of Respondent's cross-claim (pp. 13-15).

III. The District Court, in a proper exercise of its discretion, precluded the introduction of additional evidence on the basis that Petitioner had deliberately withheld that evidence at the administrative level (pp. 16-20).

IV. Rehearing *en banc* is not an appropriate proceeding for alleged inter-circuit conflicts, and requiring such proceedings would directly conflict with the Supreme Court's jurisdiction over such conflicts (pp. 21-22).

Argument.

I. The First Circuit Court of Appeals Applied the Correct Standard in its Review of the District Court Proceeding.

In conducting its review of the decision issued by the United States District Court, the First Circuit Court of Appeals assessed the proper standard of review for both trial-level and appellate review pursuant to the Education of the Handicapped Act (EHA). The Court of Appeals correctly noted that trial level review of administrative proceedings was to be governed by this Court's decision in *Hendrick Hudson District Board of Education* v. *Rowley*, 458 U.S. 176 (1982), and should address both the procedural guarantees and substantive goals of the

EHA. *Roland M.* v. *Concord School Committee*, 910 F.2d 983, 990 (1st Cir. 1990), Pet. A. at 79a. Moreover, the Court of Appeals cited *Burlington* v. *Department of Education*, 736 F.2d 773, 778 (1st Cir. 1984) (Burlington II) *aff'd* 471 U.S. 359 (1985) for the proposition that:

> "The ultimate question for a court under the Act is whether a proposed IEP is adequate and appropriate for a particular child at a given point in time."

Roland M., 910 F.2d at 990, Pet. A. at 79a-80a.

In reviewing the District Court's decision regarding the adequacy and appropriateness of the Individualized Education Plan (IEP), the Circuit Court determined that the question posed a mixed question of fact and law, subject to a "clearly erroneous" standard of review:

> Absent a showing that the wrong legal rule was employed, we have rather consistently taken the view that the district court's answer to a mixed fact/law question is reviewable only for clear error.

Roland M., id. at 990, Pet. A. at 80a (citations omitted). The Circuit Court thereupon evaluated the legal standard as applied by the District Court, determined that the correct legal rule had been applied, and upheld the District Court's conclusion regarding the adequacy and appropriateness of the IEP following an application of the clearly erroneous standard to the record as a whole. *Roland M., id.* at 990-991, Pet. A. at 81a.

In applying a "clearly erroneous" standard of review, the Circuit Court adhered to the requirements of Fed. R. Civ. P. Rule 52(a) regarding findings by the Court:

> Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, . . .

Fed. R. Civ. P. Rule 52(a). Rule 52(a) is clearly applicable to any review of findings of fact, unless the lower court applied an improper legal premise in the course of its proceedings. *See Sweeney* v. *Board of Trustees of Keene State College*, 604 F.2d 106, 109 n.2 (1st Cir. 1979); *Grant* v. *Smith*, 574 F.2d 252 (5th Cir. 1978). Unless the Petitioner is able to demonstrate that the District Court applied an improper legal standard, the "clearly erroneous" standard of review is appropriate.

In the Petition for Writ of Certiorari on this issue, Petitioner fails to allege a misapplication of the appropriate legal standard by the United States District Court. Petitioner asserts, however, that a *de novo* standard of review is particularly appropriate where no additional evidence has been received by the District Court. Petitioner's assertion ignores the clear language of Fed. R. Civ. P. Rule 52(a), which states that the clearly erroneous standard applied to findings of fact whether based on oral *or* documentary evidence, and does not require a different standard for review of a documentary record. *See, e.g., Anderson* v. *Bessemer City*, 470 U.S. 564, 574 (1985); *In re Tully*, 818 F.2d 106, 109 (1st Cir. 1987).

Finally, Petitioner attempts to equate the District Court proceedings with a hearing on a motion for summary judgment, thereby requiring a *de novo* review. The District Court, however, did not conduct a hearing on a motion for summary judgment, but conducted a trial as contemplated by the provisions of 20 U.S.C. § 1415(e)(2). The District Court strictly complied with the requirements of the EHA, and Petitioner should not be granted certiorari on the issue of the proper standard of appellate review, particularly as the Petitioner did not allege or establish a misapplication of the applicable legal standard.

II. There Exists No Jurisdictional Basis for the Court to Consider the Petitioner's Argument that Concord's Cross-Claim was Time Barred.

In order to obtain discretionary review by the Court pursuant to a petition for a writ of certiorari, the Petitioner must demonstrate the existence of special and important reasons for such review. Illustrative of the nature of reasons that may be considered by the Court include:

> (a) When a United States court of appeals has rendered a decision in conflict with the decision of another United States court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.
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> . . .
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> (c) When a state court or a United States court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way that conflicts with applicable decisions of this Court.

Rules of Supreme Court R. 10.1(a), (c).

In submitting a request for further review on the issue of the timeliness of a cross-claim, Petitioner's request should be based upon the Court of Appeal's resolution of that issue, and should at least demonstrate that the aforementioned special and important reasons exist so as to necessitate further review. Petitioner has misapprehended its obligation to the Court regarding the timeliness issue. In its resolution of the issue, the

Court of Appeals relied upon the plain language of the Federal Rules of Civil Procedure in its review of the District Court's refusal to consider the issue. Rather than addressing the Court of Appeal's invocation of the Federal Rules of Civil Procedure or whether its determination resulted in a decision which satisfied established criteria warranting further review by this Court, Petitioner has alternatively re-argued the issue as presented to the Court of Appeals, and addressed dicta contained within a footnote to the decision.

The Federal Rules of Civil Procedure comprise a set of guidelines which must be adhered to by all parties to litigation commenced within the federal courts. Federal Rules of Civil Procedure Rule 16 governs the conduct of pre-trial conferences and the subsequent production of pre-trial orders. Fed. R. Civ. P. 16(c)-(e). Pursuant to Rule 16, the pre-trial conference is conducted to consider, formulate and simplify the issues, among other matters designed to aid the court in the ultimate disposition of the action. Following the conclusion of the conference, the court issues an order which controls the subsequent course of the action, unless subsequently modified by the court to prevent manifest injustice. *Id.*

In the instant case, the District Court issued a pre-trial order, specifying the issues, following the conclusion of the final pre-trial conference. At no time did the Petitioner seek any modification to the pre-trial order, nor did it provide any notice to Respondent of its intended assertion of a timeliness issue prior to the submission of its brief on the eve of oral argument. The District Court subsequently and correctly refused to consider the timeliness issue; on appeal, the Court of Appeals affirmed the District Court's exercise of its discretion based upon the non-existence of any valid reason for modification to the order, as well as the likely resultant prejudice to the Respondent. The Court of Appeals decision on this issue comports with the resolution of similar issues by the various circuits.

E.g., Petree v. *Victor Fluid Power, Inc.*, 831 F.2d 1191, 1194 (3d Cir. 1987); *Kendura Oil & Gas, Inc.* v. *Homco, Ltd.*, 879 F.2d 240 (7th Cir. 1989), reh'g denied, August 22, 1989; *Trinity Carton Co., Inc.* v. *Falstaff Brewing Corp.*, 767 F.2d 184 (5th Cir.), reh'g denied, 775 F.2d 301, cert. denied, 475 U.S. 1017 (1985).

Rather than confronting the rationale for the Circuit Court's determination, the Petitioner has attempted to manufacture a reviewable issue upon the assertion that the timeliness question is a jurisdictional issue which may be presented at any time during the course of litigation. The jurisdictional requirements of M.G.L. c. 30A, § 14(1), if indeed applicable to review of administrative adjudicatory proceedings in the federal courts pursuant to § 1415(e)(2) of the EHA, would govern the initiation of the civil action, not the timely filing of cross claims by parties to the civil action. Moreover, Petitioner's reliance on the decision of *Group Insurance Commn.* v. *Labor Relations Commn.*, 381 Mass. 199, 408 N.E.2d 851 (1980) for the proposition that any party seeking to attack any agency decision must file its own timely complaint is patently misplaced; that decision was concerned with lack of standing due to the failure of a party to establish that it was aggrieved by an agency decision. Petitioner has not presented any argument relative to any alleged dichotomy between the various circuits concerning the existence of jurisdictional bars to the assertion of a cross-claim following the timely initiation of a civil action.

III. The District Court's Preclusion of Additional Evidence Does Not Contravene the Procedural Requirements of the EHA, nor the Court's Ruling in *Hendrick Hudson District Board of Education* v. *Rowley*, 458 U.S. 176 (1982).

In *Hendrick Hudson District Board of Education* v. *Rowley*, 458 U.S. 176 (1982), the Court engaged in its initial interpretation of the provisions of the EHA. In assessing the review requirements comprised within the procedural guarantees of the EHA, the Court noted that:

> The fact that § 1415(E) requires that the reviewing court "receive the records of the (state) administrative proceedings" carries with it the implied requirement that due weight shall be given to these proceedings.

Rowley, 458 U.S. at 206.

The Court did not, however, engage in a determination as to the proper weight to ascribe to the administrative findings, nor did the Court engage in an exposition as to the nature of the additional evidence to be received in review proceedings.

In its interpretation of the additional evidence clause contained within EHA procedural requirements, the First Circuit Court of Appeals determined that in any review proceeding conducted pursuant to the Act:

> . . . the Act contemplates that the source of the evidence generally will be the administrative hearing record, with some supplementation at trial.

Burlington II, 736 F.2d at 790.

The Court of Appeals subsequently enunciated a non-exclusive list of reasons that would likely result in supplementation

of evidence; however, the court determined that the starting point for a determination of receipt of additional evidence would be the record of the administrative hearing. According to the court:

> The determination of what is "additional" evidence must be left to the discretion of the trial court which must be careful not to allow such evidence to change the character of the hearing from one of review to a trial *de novo*. . . . In ruling on motions for witnesses to testify, a court should weigh heavily the important concerns of not allowing a party to undercut the statutory role of administrative expertise, the unfairness involved in one party's reserving its best evidence for trial, the reason the witness did not testify at the administrative hearing, and the conservation of judicial resources. . . .

Burlington II, id. at 791.

In adhering to these precepts, the courts would thus enable parties to present additional evidence at the review level if the reviewing court deemed such evidence to be pertinent and not designed to subvert the administrative hearing process and transform a review proceeding to a trial *ab initio*.

In the instant case, the District Court declined to admit the evidence proffered by the Petitioner on the basis that the evidence had been deliberately withheld at the administrative hearing. Pet. A. at 64a, n.1. The Court of Appeals affirmed that decision, noting that Petitioner had conceded that the evidence had been deliberately withheld so that the testimony could be presented in court as opposed to during the administrative hearing. *Roland M.*, 910 F.2d at 997, Pet. A. at 92a. The Court of Appeals concluded that such a tactic, if permitted, would render the administrative proceedings nugatory, and convert the § 1415(E) review proceedings into a trial *de novo Roland M.*, 910 F.2d at 997, Pet. A. at 93a.

The Petitioner contends that the Court of Appeals decision somehow extends the *Burlington II* limitation of additional evidence, and effectively converts all district court proceedings to a review of the administrative record. Plainly, however, the Court of Appeals determination is based upon the existing standards for ruling on motions for witnesses to testify, as enunciated within the *Burlington II* decision, and does not constitute an extension of those standards. Petitioner's actions at the administrative hearing level clearly implicate all four of the above-mentioned cautionary concerns highlighted by the *Burlington II* decision, and the District Court correctly barred the proffered evidence. As noted by the First Circuit Court of Appeals in its review of the District Court's exclusion of evidence:

> Before us, and below, the parents conceded that the core element of this finding was true: they deliberately withheld the witnesses from the second round of BSEA proceedings, preferring to use them in court. And they have come forward with no convincing explanation why their game of cat-and-mouse should have been countenanced or the evidence admitted in the district court.
>
> We refuse to reduce the proceedings before the state agency to a mere dress rehearsal by allowing appellants to transform the Act's judicial review mechanism into an unrestricted trial *de novo*. Where parties could have, but purposely chose not to, call certain witnesses at the administrative hearing, the district court has discretion to exclude the testimony on judicial review. . . . In the absence of special circumstances, courts should ordinarily exercise that discretion in favor of excluding the belatedly offered evidence.

> To be sure, district courts are empowered to hear testimony not presented before the state agency. Yet, that power is a hedge against injustice. Injustice cannot credibly be claimed when, as here, parties willfully elect to leapfrog the agency proceedings. While "the legislative history of the Act reflects the understanding that exhaustion is not a rigid requirement . . . litigants are discouraged from weakening the position of the agency by flouting its processes." . . . Counsel's unfounded disdain for the administrative process, without more, cannot persuade us to ignore both our own precedents and the elaborate protocol mandated by Congress. We discern no abuse of the lower court's sound discretion in this situation.

Roland M., 910 F.2d at 997, Pet. A. at 92a-94a. (Citations omitted) (footnotes omitted). Rather than contravene the *Rowley* decision, the preclusion of the proffered additional evidence ". . . structurally assists in giving due weight to the administrative proceeding, as *Rowley* requires. *Rowley*, 458 U.S. at 206." *Burlington II*, 736 F.2d at 790. By upholding the integrity of the administrative hearing process and preventing the Petitioner from transforming a review proceeding into a trial *de novo*, the lower courts have adhered to the *Rowley* directive that due weight shall be given to the administrative proceedings, and that reviewing courts should not impose their own view of preferable educational methods upon the States. *Rowley*, 458 U.S. at 206, 207.

In its Petition for Writ of Certiorari on this issue, Petitioner cites three separate cases in support of its contention that the *Burlington II* restrictions on receipt of additional evidence conflict with the findings of other courts of appeal. In *Burke County Board of Education* v. *Denton*, 895 F.2d 973, 981 (4th Cir. 1990), the Fourth Circuit Court of Appeals cited the

Burlington II decision with regard to the proper weight to ascribe to the administrative findings, and did not address the *Burlington II* definition of additional evidence. *Burke County Board of Education*, 895 F.2d at 891. In *Barwacz* v. *Michigan Dept. of Education*, 681 F. Supp. 427, 430-431 (W.D. Mich. 1988), a district court decision, the court, in citing the *Burlington II* decision, admitted additional evidence following a determination that the admission of such evidence, in light of the circumstances of that case, would not transform the case into a trial *de novo*. *Barwacz*, 681 F. Supp. at 430-431. In *Metropolitan Government of Nashville and Davidson County* v. *Cook*, 915 F.2d 232, 234 (6th Cir. 1990), although the Sixth Circuit disagreed with the *Burlington II* definition of "additional," the Court admitted additional evidence, in an apparent exercise of its discretion, following its determination that the proffered evidence would not undercut the statutory role of administrative expertise. *Metropolitan Government of Nashville and Davidson County*, 915 F.2d at 235. Rather than conflict with the First Circuit on the issue of additional evidence, therefore, the cited cases may be viewed as conforming with the *Burlington II* guidelines.

Clearly, in its *Roland M.* decision, the First Circuit did not further limit the admission of additional evidence, as alleged by the Petitioner, but merely correctly applied the *Burlington II* standards to the particular circumstances of the within case. In applying those standards, the First Circuit did not conflict with the decision of another United States court of appeals on the same matter, nor did it contravene the *Rowley* court in its delineation of the proper weight to ascribe to administrative proceedings.

IV. Rehearing *en banc* Is Not an Appropriate Proceeding for Alleged Inter-Circuit Conflicts.

Rehearing *en banc* is an unusual proceeding wherein the Court of Appeals, in an exercise of its discretion, determines to rehear a particular case before the full court due to specific extraordinary circumstances. Pursuant to F.R.A.P. Rule 35:

> Such a hearing or rehearing is not favored and ordinarily will not be ordered except (1) when consideration by the full court is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance.

Unless a party is able to demonstrate that the decision in a particular case conflicts with prior decisions in that same circuit, or involves a question of exceptional importance, rehearing *en banc* is not an available remedy.

In its Petition for Writ of Certiorari, Petitioner requests that this Court further extend the grounds for obtaining a rehearing *en banc*, conferring jurisdiction on the Court of Appeals essentially equivalent to that of the United States Supreme Court. Rather than limit a discretionary rehearing *en banc* to situations wherein a Circuit Court perceives a lack of uniformity intra-Circuit, Petitioner seeks mandatory rehearing *en banc* whenever a Circuit Court decision may result in a lack of uniformity inter-Circuit. Petitioner is unable to demonstrate the existence of any of the enumerated grounds for assertion of jurisdiction by the Court on the issue, relying essentially on dicta. Additionally, Petitioner's requested extension of jurisdiction for rehearing *en banc* directly conflicts with the jurisdiction of this Court, which is the only appropriate forum to address uniformity among the various circuits. *See* Rules of Supreme Court, Rule 10.1.

As the First Circuit Court of Appeals, in an exercise of its discretion, properly determined that the grounds for a requested rehearing *en banc* did not exist warranting further review, and Petitioner is unable to demonstrate any reason for assertion of jurisdiction on the issue by this Court, the Court should deny petitioner's application for Writ of Certiorari.

Conclusion.

Based upon the foregoing, the Court should not issue a Writ of Certiorari regarding the decision issued by the First Circuit Court of Appeals.

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